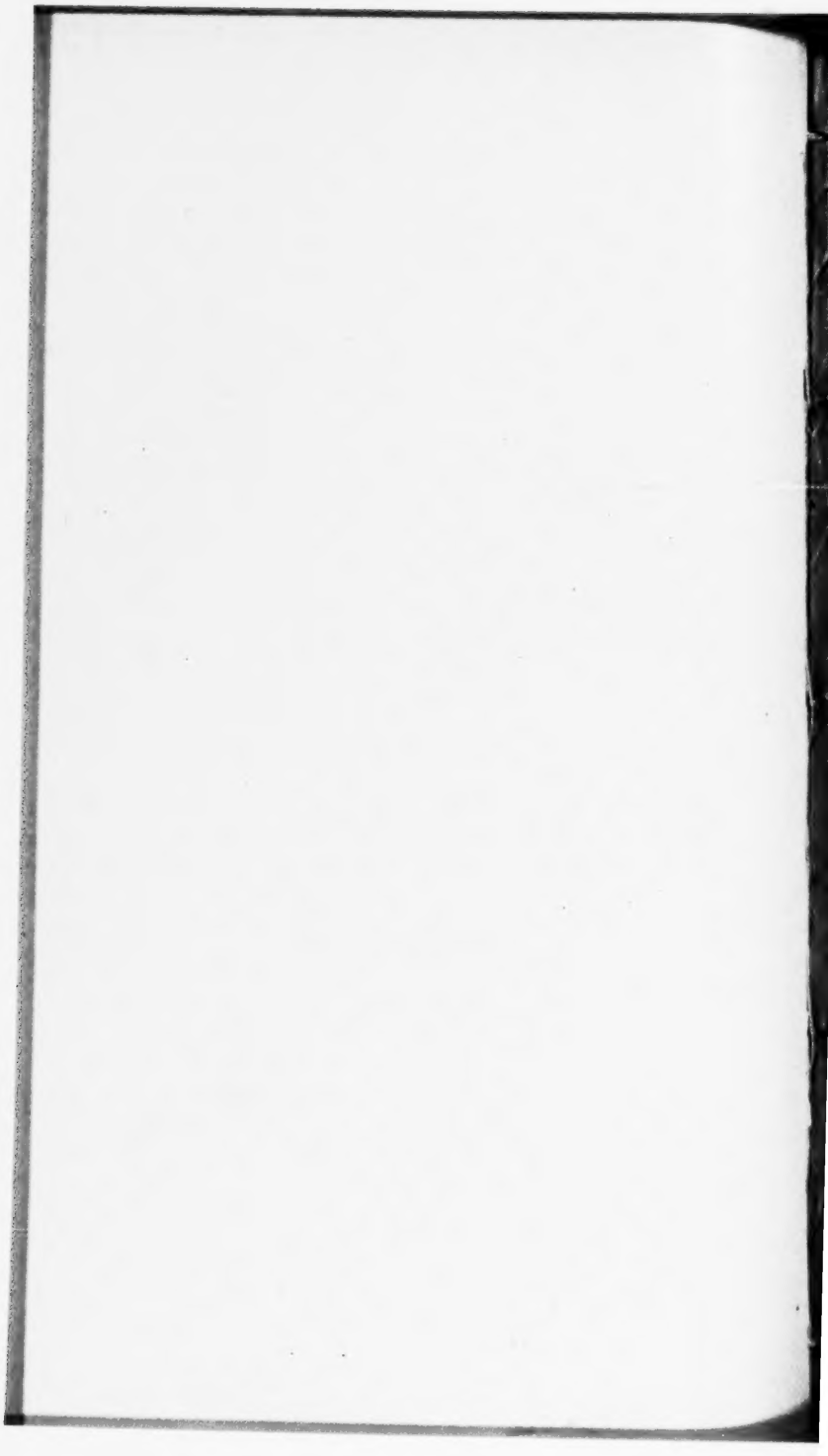

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No. 143.

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 143.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR.

vs.

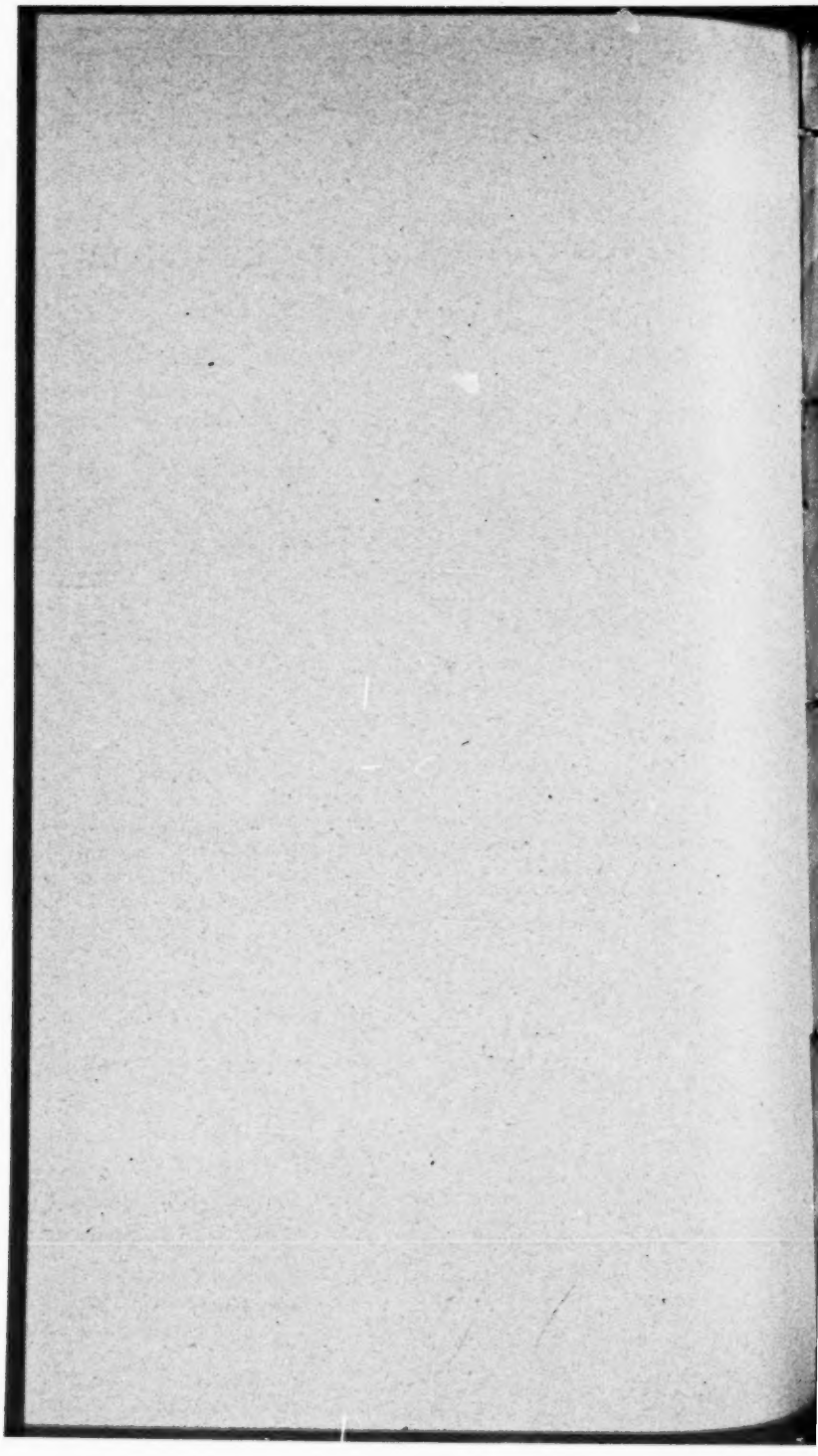
L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

BRIEF IN REPLY OF PLAINTIFFS IN ERROR.

GEO. W. MONTEITH,
ATTORNEY FOR PLAINTIFFS IN ERROR.

(17,533.)

FILED JANUARY 1901.



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BRIEF IN REPLY TO PLAINTIFFS IN ERROR.

The position assumed by our adversary makes it perhaps advisable to briefly reply to his assertion that this court is without jurisdiction to determine the question presented on the merits.

No attempt whatever is made by opposing counsel to answer the six propositions we advance on the merits, and it seems to us that they are all so plainly within the operation of section 709 R. S. that it is almost superfluous to make any extended discussion of them; still, we will in a few words analyze and present the jurisdictional questions and review the authorities defendant in error offers.

Jurisdiction.

Each of the six points raised by us will be shown to present a clear federal question under section 709 R. S.

To begin with that section presents three general classes, that cover nine separate heads; of cases within the purview of that section.

ANALYSIS OF SECTION 709 R. S.

The Supreme Court of the United States under this section has power to review any judgment or decree of a State court, that is:

First—A final judgment or decree.

Second—Of the highest court in the State empowered to render it.

Third—Embraced in one of three classes to wit:
CLASS A.
Where there is drawn in question the validity of:

1. A treaty of the United States.
2. A statute of the United States.
3. An authority exercised under the United States.

Wherein the decision is against the validity.

CLASS B.
Where there is drawn in question, on the ground of being repugnant to the Constitution, treaties or laws of the United States the validity of:

4. A State statute.
5. An authority exercised under a State,

Wherein the decision is in favor of the validity.

CLASS C.
Wherein is claimed and specially set up under:

(a) The Constitution of the United States.
(b) Any treaty of the United States.
(c) A statute of the United States.
(d) A commission held under the United States.

Either.

6. A title.
7. A right.
8. A privilege.
9. An immunity.

Wherein the decision is against the same.

I

The first question both in order and importance is that which relates to our absolute title under the treaty of Guadalupe Hidalgo to the land in dispute.

The vitality of that title is derived wholly from that treaty, as a specific right and title to a part of the "Rancho Corte Madera del Presidio," or Reed Ranch, under its provisions.

The act of March 3, 1851, gave to the United States District Court of California exclusive jurisdiction, so far as California was concerned, to finally adjudicate all such rights and titles under the treaty, subject only to an appeal in each case to the Supreme Court. This was done and on January 14th, 1856, that court made and entered its decree which became final, confirming unqualifiedly the Reed title accordingly as laid down in the grant of juridical possession. The land department refused to give effect to this title in part by leaving the land in dispute out of the quit claim patent it gave to

the Reeds for the balance of the grant after they had sold the excluded portion to our predecessors in estate, subsequent to the Reeds. Because the Land Department did so, *and for no other reason whatever*, the Superior Court of Marin County, California, also refused to give effect to the title as to the excluded portion and rendered judgment ejecting us *solely because the land department had decided against us*. Neither in the department, whose proceedings were all before the Superior Court, nor in that court was there any evidence adduced showing, or even tending to show, the land was not an integral part of the grant, on the contrary, we both plead and proved our complete deraignment of title from Reed, the continuous possession of ourselves and our predecessors from 1835 down to the present time, and that the very definite and certain lines of the grant of juridical possession included this land. The evidence being without conflict presented only questions of law as to its legal effect. The Superior Court refused to give effect to our title, set aside the decision of the United States District Court, and denied our plain right to the land so clearly and undisputably shown by the evidence to be wholly ours under the treaty.

Applying the above analysis we find:

It is a final judgment, rendered by the highest court empowered to render a decision in the case (Supreme Court of California), and embraced in subdivisions 3 of class A and 6 and 7 of class C; being under the former (class A–3) a decision against *an authority* (that of the U. S. District Court) *exercised under the United States* (*to finally adjudicate the title*) and under the latter (class C, 6 and 7) a decision against *a right* and *a title* that was claimed and specally set up (in the pleadings) specifically under a treaty (Guadalupe Hidalgo) and generally under the Constitution and laws of the United States.

II

The foundation of the Wormouth title was his patent, and before he could even question the validity of our title he must present a patent that if the land should prove under the treaty to be public land, would operate as a valid grant of the Government title. If his patent was void in either case he could not maintain ejectment. If his entry was void the patent upon it is necessarily so—this we clearly demonstrate *upon the merits* in our opening brief. Assuming then that the entry and patent were absolutely void is then a decision of a state court, that boldly sets aside the laws of the United States and the decisions of its courts and validates an entry and patent void by those laws and decisions, reviewable under section 709, R. S. If so, under which of the nine

heads and within which of the three classes will it be found in the above analysis?

Is it not plainly within the purview of number 5 in class B--"An authority exercised under a state," *drawn in question as repugnant to the Constitution, treaties or laws of the United States*, in a case where the decision of the highest court in the State is in favor of the validity of the authority.

The essential "authority exercised under a statute" is the authority of the Superior Court of Marin County to try and determine cases. Its exercise of its authority to override the laws of the United States (its statutes and the decisions of its courts, its written and unwritten laws) and to hold valid that which is void under those laws is certainly the exercise of its authority in a manner that is "repugnant" to such laws.

Then with the decision of the State Supreme Court in favor of the validity of the authority of the Superior Court, to so overturn the laws of the United States, it meets every requirement of the section.

III

The third question, that the right and title we assert under the treaty, is *res judicata*, is reviewable as a question as to the validity of "an authority exercised under the United States" wherein the decision was against the validity; the finality of a final judgment rendered under the Act of March 3, 1851, has been repeatedly held by this court to be unquestioned.

"The question of its correctness is forever closed."

United States *v.* Halleck, 1 Wall. 453.

It is well expressed by Mr. Justice Field at circuit court wherein he says:

"The validity of the decree and of the grant upon which "the claim of Yorba was founded was thus forever put at "rest. From that day it could never be successfully ques- "tioned in any form of procedure or by any tribunal known "to our laws. It was a closed question for all time.

United States *v.* Flint, 4 Saw. 56.

It is also reviewable as a decision of the highest court in the state againts the validity of a federal statute drawn in question in the case; as it in effect holds that the statute of March 3, 1851 is invalid when it provides that a determination under its provision *is final* (Class A—2) and is still further reviewable as a decision against a *right* specially set under the Constitution, treaties and laws of the United States (Class C—7) the right being that of having the decision of the district court recognized as final and *full effect given to the title it sustains.*

IV.

The fourth point are that the state courts are without jurisdiction, *of the subject matter of the actual case presented*, in the ejectment proceeding is reviewable as a decision in favor of the validity of an authority exercised under the state drawn in question as repugnant to the Constitution, treaties and laws of the United States. (Class B—5.) The authority of the Superior Court of Marin County to again call in question and assume jurisdiction to re-determine the question of this title contrary to the previous final determination of the district court under the Act of March 3, 1851 which confers exclusive power on the district court so to do, is certainly repugnant to that express law of the United States.

V.

The fifth question—the first nnder the equitable branch of the case, is as to our right to a patent in the nature of a quit claim, under the provisions of section 7 of the Act of July 23, 1866, (14 statute 218) presents a definite issue upon undisputed evidence to our right to this patent, (Class C—7) as a *right* that was *specially claimed and set up*, under a treaty (Guadalupe Hidalgo) and a statute (act of July 23, 1866) wherein the decision was against our right. (See opening brief pp. 65 *et seq.*

Review of Opponent's Authorities.

Defendant in error says that as the question is "one of boundary alone this court has no jurisdiction."

It is not a question of boundary at all, *but a question of title* to what was admittedly an integral part of the grant, unlawfully excluded by the land department refusing to give full effect to the decree of the District Court.

By cutting off a portion of the land, necessarily the boundaries were altered, *but there is no question as to where they lay.* The boundary question, if any, was which set of boundaries were valid, *not where settled boundaries were physically located.*

The question as to *what the boundaries are*, is always *a question of title*, while that, as to where the boundaries are actually located is a pure question of fact: as in the case of the location of a boundary between neighbors for even though both of their titles may have once been treaty rights, the dispute between them as to the location of the dividing line, raises only an ordinary question of fact, and where it in no wise involves the *title* this court clearly is without jurisdiction.

This is all the three cases cited by our adversary hold.

Almonester v. *Kenyon*, 9 How. 1, simply involved the *fact* as to *where* the dividing line was. Neither *title* was called in question. In that case Mr. Justice Catron for the court said:

> "Now that this court has no jurisdiction under the "25th section of the Judiciary Act of 1789, to re-"examine the decision of a state court which drew in "question the mere fact of where a dividing line be-"tween two tracts of land was, is too plain for dis-"cussion, * * * * the fact is found that no "interference exists between the tracts of land respec-"tively claimed and with this settled fact we have to "deal.

Lanfear v. *Hunley*, 4 Wall 204 was an action that involved a dispute as to the location of a boundary. The boundary was admittedly the "Bayou Crocodile," but its location—which of several bayous (4 Wall. p. 205) it was, was *the fact* in dispute. At the time of the suit, a certain bayou known as the "Bayou Crocodile" was the only one then known by that name and Hunley claimed it was the one referred to in the grant while the plaintiff Lanfear claimed another or several others were so called when the grant was made.

The only question then was which bayou was the "Bayou Crocodile," a mere fact in nowise involving the *title*. It was a question as fo *where* the boundary the "Bayou Crocodile" was and not as to *what* constituted the boundaries included in the title.

Mr. Justice SWAYNE for the court very correctly said:

> "The fact that the land to which the boundary re-"lates is held by a title derived from an Act of Con-"gress, does not change the result. (Italics ours.) "*If the title be admited*, as recognized by the act, its "location upon the land is a subject wholly within "the cognizance of the State tribunals * * * *."

> "In such cases our anthority is limited to errors re-"lating to the title. *If any such are committed it is our "duty to correct them* * * * * *. In the case "before us, the Supreme Court of Louisiana construed "correctly the several acts of Congress relating to "the subject of the controversy * * *. *Full effect "was given to the title.* The error, if any were com-"mitted, *was in locating it upon the land.*"

Dower v. *Richards*, 151 U. S. 658, has no bearing upon any conceivable view of this case. Here there is no conflict in the evidence, the questions being all of law upon the legal effect of undisputed facts, while in that case Mr. Justice Gray for this court said:

> " The principal ground on which the plaintiffs seek
> " to reverse the judgment of the Supreme Court of
> " California is that its decision in matter of fact was
> " erroneous and contrary to the weight of evidence in
> " the case. But to review the decision of the State
> " court upon the question of fact, is not within the
> " jurisdiction of this court."

This decision clearly has no application here as the evidence being absolutely without conflict there is no question of fact in the record.

Defendant in error next asserts that three questions of fact were involved in the contest before the Land Department (see transcript Pro. in Ld. Tr. pp. 46-118), which he enumerates:

(a) " *Was the land in controversy ever within the grant to Reed?*"

In other words, was the land *public or private land under the treaty?* A question beyond the power of the department to determine whose authority is limited to deciding questions between those who claim *under* and not *against* the Government.

That question as it was presented to the department, as we have already shown, was a pure question of law—of the legal effect of testimony in which there was no conflict whatever.

(b) " Was Throckmorton a purchaser in good faith and for a valuable consideration within the meaning of the act of July, 1866."

This was also considered on unconflicting testimony, but as Throckmorton proved a complete title to the land as a right under the treaty as already shown (opening brief p. 65) these questions could not be raised and their decision amounted to nothing whatever.

(c) " Had Wormouth complied with the law so as to be entitled to his patent?"

Was shown also upon unconflicting testimony of Wormouth himself, that his entry was void as a pure matter of law, because he admitted it was made when our predecessors were in possession under at least color of title.

Under this head he cites:

Moreland v. Page, 20 How. 252, a case having no possible application to this controversy and wherein Mr. Justice Grier speaking for the court, said: " It is a mere question of boundary between two neighbors, both admitted to have valid grants from the United States."

Aurora, etc., Co. v. Mining Co., 34 Fed. 515, was a case between rival claimants to a mining claim when the decision

of the department on some questions of fact, *that were properly cognizable before it*, were controverted and the Circuit Court, Sabin J,, properly held: (italics ours.)

> "By law the officers of the Land Department are "charged with the whole business of *transferring the "government title to public land* and they are exclu- "sively charged with that duty. *Within the sphere "of their duty* their decisions upon questions of fact "are conclusive upon all parties. They may, like other "officers. err in regard to matters of law and the cor- "rect interpretation thereof. In such cases upon "proper proceedings, had for that purpose, their judg- "ments or decisions may be reviewed by the courts and "corrected of erroneous."

The case at bar being on unconflicting evidence is reviewable in any event, but it is not as Judge Sabin puts it: "*Within the sphere of their duty.*" That "sphere of duty" does not extend to deciding cases between the United States or those claiming under them on the one hand and those who claim against and deny the primary title of the Government on the other.

Telluride Power Co. v. Rio Grande, etc., Ry., presents nothing involved in this case. Mr. Justice Brown in speaking for the court, said:

> "These were local and not federal questions. The "jurisdiction of this court in this class of cases does "not extend to questions of fact or of local law, which "are merely preliminary to, or the possible basis of a "federal question."

Craig v. Lietensdorfer, 123 U. S. 189, involved merely a question of practice—of prematurely bringing an action in equity on the ground of fraud before the department had acted, and Mr. Justice Matthews for the court said:

> "When the department had exercised its discretion "and exhausted its functions, the legal and equitable "effect of what it has done or failed to do, may be "drawn in question, when necessary to the determina- "tion of conflicting rights between private parties in "a judicial proceeding; but as long as the alleged "rights, which are the subject of contention, are in the "course of adjudication, by the special tribunal to "which they are referred for settlement, the function "of that tribunal cannot be displaced by the courts of "justice."

Marquez v. Frisbie 101 U. S. 473.—is similar to the preceding case and for the court Mr. Justice Miller said :

> " It is plainly apparent from this, first, that the " defendants had not the legal title ; second, that it " was in the United States ; and third, that the matter " was still *in fieri* and under the control of the land " officers."

Vance v. Burbank 101 U. S. 519.—Mr. Chief Justice Waite for the Court said :

> " The question in dispute is one of fact ; that is to " say, whether Scott, when he demanded his patent " certificate as against the other contesting claimants " *(for a government title)* had resided on and cultivated " the lands in dispute four successive years," etc.

Counsel cites three cases in support of the proposition that " when a survey *conform to the decree* confirming the *grant, as nearly as practicable* the survey will not be disturbed even on direct attack." We do not contest a plain proposition of law like that, but it has no bearing on the matter, for this case presents no such question. In this case the survey shows no relation to the decree whatever—it lays out an entirely different set of boundaries from the very definite ones presented in the grant if juridical possession to Reed and that constituted the boundary lines of his land *ten years before the Mexican War and twenty years before confirmed by the District Court.*

The very point here is *that the survey does not conform to the decree*, either " as nearly as practicable " or at all. It plainly violates it and assumes to destroy, in part at least, a valid title under the treaty, more than that there is not even a survey merely a *compiled map.*

United States v. *Flint*, 4 Saw. 61, on the survey question in the Circuit Court said :

> " Whether the survey conforms to the claim or var- " ies from it, is a matter with which the courts have " nothing to do * * * *. The courts can only " examine into the correctness of a survey when, in a " controversy between parties, it is alleged that the " survey made infringes upon the prior rights of one " of them : and can then look into it only so far as may " be necessary to protect such rights. They cannot " order a new survey or change that already made "

This simply means that the courts cannot trench upon the province of the executive in the performace of *executive acts.*

No more than can the executive trench upon the province of the judicial department as it in this case has when the land office assumed to re-adjudicate a settled land title.

The sixth question raised by us being conceded both by the state court and by our opponent, in case we are right in our contention upon the fifth, it is unneccessary to discuss it at length.

Respectfully submitted,

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Attorney for Plaintiffs in Error.

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